IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE

Of Counsel:

CHARLES W. CAMPBELL
General Counsel
Public Service Company
of Indiana, Inc.
1000 East Main Street
Plainfield, Indiana 46168

HOWARD E. WAHRENBROCK
Attorney for Public Service Company of Indiana, Inc.
Room 605
1725 K Street, N.W.
Washington, D.C. 20006

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BRIEF FOR PUBLIC SERVICE COMPANY OF INDIANA, INC., AMICUS CURIAE

Subject to the granting of the attached motion for leave to file, Public Service Company of Indiana, Inc., submits this brief *amicus curiae* to bring to the Court's attention a basic argument in support of petitioner on the first question presented (Pet. Br. p. 2), which is:

> Whether the FPC has a duty to investigate charges of Sherman Act violations under § 204 of the Federal Power Act.

I. ANTITRUST LAWS AND POLICIES ARE NOT APPLICABLE

PSCI's argument, stated in broad general terms, is that the legality of prevention of competition in bulk supply of electric power by the alleged company activities is governed by § 202(a) of the Federal Power Act, not by antitrust laws or policy. This argument has not been elucidated by petitioner or the FPC in this Court or at any stage in the proceedings that are here for review, nor has the support for it in the legislative history of the Power Act been shown.[1]

The Cities position.—Lafayette and Plaquemine, Louisiana ("Cities"), seek to stop certain alleged activities of Gulf States Utilities Company, by delaying its raising of needed capital. By means of those activities, according to the allegations, Gulf States, together with Louisiana Power and Light Company and Central Louisiana Electric Company,[2] has:

> (1) blocked construction by Louisiana Electric Cooperative, Inc. ("LEC")[3] of a competing (and duplicative) electric generating and transmission system designed to take over the supply of power to a number of distribution cooperatives that are now supplied by Companies through their interconnected and coordinated bulk power supply systems;

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[1] The closet approach is at Pet. Br., p. 16.

[2] The three companies are referred to herein collectively as "Companies."

[3] LEC is described in the opinion of the court below as a "generation and tranmission cooperative financed by the Rural Electrification Administration . . . [and] made up of twelve electric distribution cooperatives . . . ." *City of Lafayette, Louisiana* v. *FPC*, 454 F.2d 941, 944-45 (D.C. Cir. 1971); Pet., App. A, p. 5a).

(2) imposed conditions upon transmitting power for LEC, Dow Chemical Company, and Cities, and, by means thereof, has

(3) prevented carrying out an agreement among Cities, Dow, and LEC for interconnection and coordination of their generating systems to supply their combined loads.

In other words, Cities say that the Companies first prevented construction of a competing bulk power supply system and are now preventing establishment of a competing system that would use Companies' transmission facilities. (Pet. App. A, pp. 5a-7a). There is no allegation that there has been any prevention of access to the FPC for

(1) an order under § 202(b) of the Federal Power Act that would make available the benefits of regionally integrated bulk power supply systems,

(2) a § 207 order for adequate and sufficient service,

(3) a § 205 order for rates, facilities, contract, practices or services that are just, reasonable, and not unduly discriminatory or preferential, or

(4) a declaratory order under § 309 of the Power Act, the Administrative Procedure Act (5 U.S.C. § 554(e), and § 1.7(e) of the FPC Regulations (18 C.F.R. § 1.7(e)) to implement the purposes and standards of provisions of the Power Act.[4]

The Cities contend that the Companies' alleged activities amount to a conspiracy for bulk power supply

[4] For the cited sections of the Federal Power Act, see Pet., App. G, pp. 43a *et seq.*

monopolization that is illegal under the antitrust laws, and that the funds that Gulf States sought FPC authority to raise would be used in the course of, or in furtherance of, that conspiracy and, hence, for objects that do not meet the Power Act's § 204(a)[5] stipulation that the securities issue be "for some lawful object . . . and compatible with the public interest" (Cities' Mem. in Opp., p. 2).

The bulk power supply statutory objective.—The Cities are mistaken. Preventing competing independent bulk power supply is not in itself an unlawful object. It serves the public interest plainly stated by Congress in the Power Act. Indeed, Congress made it the duty of the FPC to *"promote and encourage"* noncompetitive regionally-integrated bulk power supply systems. Section 202(a)[6] provides:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization of natural resources, the Commission is empowered and directed to divide the country into *regional districts for the voluntary interconnection and coordination of facilities* for the generation, transmission and sale of electric energy. . . . Each district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. *It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each district and between such districts.* . . . [Emphasis supplied.]

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[5] 49 Stat. 850 (1935); 16 U.S.C. 824c(a); Pet., App. G, p. 47a.

[6] *Id.*, 824a(a); Pet., App. G, pp. 44a-45a.

The objective remained unchanged throughout the legislative process.—The legislative history of the 1935 Federal Power Act shows that the objective of interconnection and coordination of bulk power supply facilities was embodied in the proposed Part II from its first introduction in Congress. It demonstrates that the intended integration and coordination was the antithesis of the competition that is the objective of the antitrust laws. It also reveals the deliberateness with which Congress embraced the abandonment of competition as a method of control of the bulk supply of electric power.

The adoption of this objective represented a marked difference from the approach taken by Congress in Part I of the present Federal Power Act, which was originally enacted in 1920 as the Federal Water Power Act.[7] There, in seeking the comprehensive development of the water power resources of the nation,[8] Congress in 1920 simplistically followed the approach of the Sherman Act and prohibited restraints of trade.[9]

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[7] 41 Stat. 1063, 16 U.S.C. 791-823.

[8] See *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 180 (1946).

[9] Part I of the present Federal Power Act, enacted in 1920 as the Federal Water Power Act for the licensing of hydro-electric projects, expressly made antitrust policies applicable (41 Stat. 1068 (1920), § 10(h); 16 U.S.C. 803). That section is inapplicable in the field of interstate commerce in electric energy which Congress first occupied with the enactment of the Federal Power Act in 1935 (Part II of Title II of the Public Utility Act of 1935, 49 Stat. 847-853; 16 U.S.C. 824-824h). *Pennsylvania W. and P. Co.* v. *FPC*, 89 U.S. App. D.C. 235, 242-243, 193 F.2d 230, 237-238 (1951), affirmed, 343 U.S. 414 (1952). Numerous decisions establish the necessity for reading the 1935 Part II independently of the 1920 Part I. See, *e.g.*, *United States* v. *P.U.C. of California*, 345 U.S. 295, 302-304 (1953); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 22-24 (1952); *FPC* v. *Southern California Ed. Co.*, 376 U.S. 205, 216-220 (1964).

But in 1935, representatives of the FPC, who drafted Part II of the originally proposed new Federal Power Act[10] for the regulation of interstate commerce in electric energy, set forth in their § 203(a) the first version of what was ultimately enacted as § 202(a). Their proposal was introduced in Congress as Title II of the Wheeler-Rayburn Bill.[11]

As they originally drafted Part II of that bill, it contained broad provisions to enable the FPC to achieve the objective of interconnection and coordination of bulk power supply facilities by compulsory means and to initiate action if necessary for that purpose.[12] FPC Commissioner Seavey submitted a pre-

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[10] Hearings, H.R. Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., on H.R. 5423 (1935), pp. 57, 190, 400-401, 515.

[11] S. 1725, 74th Cong., 1st Sess. (1935) and H.R. 5423, 74th Cong., 1st Sess. (1935). Section 203.(a) of Part II in Title II of the bill read as follows: The Commission is empowered and directed to establish regional districts for the control of the production and transmission of electric energy, including interchange of energy, interconnection of facilities, and determination of the uses to be made of the facilities in such districts. Such control shall be designed to secure an abundant supply of electricity with the greatest possible economy and in the interest of the national defense and the proper utilization and conservation of natural resources. Such control, except in time of war or other emergency declared to exist by proclamation of the President, shall, as far as practicable, be by voluntary coordination under the supervision and direction of the Commission of the privately and publicly owned electric facilities in and between the several districts so established."

[12] The powers that would have been conferred by the original bills included:

(1) The power to compel a public utility to connect with, and to sell electric energy to, or exchange energy with, any other

pared memorandum at the ~~Senate~~ House Committee hearing stating with respect to § 203 of the bill:[13]

> This section furnishes the basis on which integrated regional systems of power generation and transmission may be built. . . . It also affords a means of eliminating the evils that accompany rivalries and jealousies between systems in *a field where competition has long been abandoned as a method of control.* Present companies would gain strength and stability through the increased use of their facilities and the elimination of wasteful duplication of plant and services. [Emphasis supplied.]

FPC Solicitor DeVane described the provisions for the interconnection and coordination of electric facilities into regionally integrated systems as, being to his mind, "the most important part of this bill."[14] He

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"person" without being limited to acting on an application by a State commission or a "person engaged in the transmission or sale of electric energy." S. 1725 and H.R. 5423 (*supra*, p. 10, n. 11), § § 203(b); compare § 202(b) of the Act as enacted, 49 Stat. 848 (1935), 16 U.S.C. 824a(b).

(2) Broad requirements for certificates of public convenience and necessity for all facilities and services subject to FPC jurisdiction and abandonments. *Id.* § § 204(a) and (b).

(3) A provision subjecting the regulated public utility to the obligation to serve any person on reasonable request, similar to the usual utility obligation in retail service. *Id.*, § 202(a).

(4) A "common carrier" type of obligation to transmit energy for other "persons." *Id.*, § § 203(b).

[13] Hearings (*supra*, p. 10, n. 10) pp. 383-385.

[14] Hearings (*supra*, p. 10, n. 10), p. 501. Mr. DeVane later went on to explain why: ". . . [W]ith proper interconnections and the formation of regional districts standby facilities can be reduced 15 per cent on the average and not to exceed 20 per cent, which will result in very substantial savings to the public." (*Id.*, p. 2148; see also pp. 269-274, 2152-3, 2165-8; and Hearings, S. Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess. (1935), pp. 238-239, 245-246, 257-258, 272-274, 797-800.)

contrasted it with the Interstate Commerce Act:[15]

> There is nothing in this bill . . . that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission. . . .
>
> There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress.

Questioned whether the elimination of competition was part of a conception of making the whole electric industry into a single entity (as charged by some opponents of the bill) so that it would be more readily subject to "nationalization,"[16] Mr. DeVane answered that there was already "practically no duplication in the field."[17]

In the course of the bill through Congress the language of § 203(a)[18] was altered, but without changing the purpose to achieve non-competitive regionally integrated bulk power supply. Most of the provisions for compulsion[19] were eliminated because it was felt that

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[15] H. Hearings (*supra*, p. 10, n. 10), p. 554; see also p. 385.

[16] See, *e.g.*, S. Hearings (*supra*, p. 11, n. 14), p. 271; H. Hearings (*supra*, p. 10, n. 10) pp. 436, 444-45; *cf.* pp. 855-56, 59.

[17] H. Hearings (*supra*, p. 10, n. 10), p. 2148.

[18] Renumbered § 202(a) in the Senate Committee substitute bill, S. 2796, 74th Cong., 1st Sess. (1935).

[19] The provisions of S. 1725 referred to above, pp. 10-11, n. 12, for certificates of public convenience and necessity, and imposing public utility and common carrier type obligations were eliminated in S. 2796.

in this first Federal exercise of power over the electric industry reliance should be placed on voluntary action and the enlightened self-interest of the utilities. These changes were made initially in a substitute bill [20] reported out by Senator Wheeler's Committee.[21]

[20] S. 2796, 74th Cong., 1st Sess. (1935).

[21] S. Report No. 621, 74th Cong., 1st Sess. (1935), p. 19. The report stated (pp. 17-18, 49):

"The necessity for Federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible cost has been clearly revealed in the recent reports of the Federal Power Commission, the Mississippi Valley Committee, and the National Resources Board. Assertion of the power of the Federal Government in this direction becomes the more important at the time when the Federal Government is compelling the reorganization of holding companies along regional lines. The new part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by title I of the bill."

* * * * * *

"SECTION 202. INTERCONNECTION AND COORDINATION OF FACILITIES

"This section sets up the machinery for the promotion of the coordination of electric facilities. By subsection (a) the Commission is directed to divide the country into regional districts, consisting of areas which can economically be served by interconnected and coordinated facilities. Within each such district and between such districts the Commission is directed to secure such interconnection and coordination by voluntary action as far as practicable. To the extent that this action is to be voluntary, public as well as private plants are included. Before establishing any district the Commission is to give notice to the State commissions and afford them an opportunity to present their recommendations.

"Under this subsection the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The committee is confident that enlightened self-interest will lead the utilities to cooperate with the Commission and with each other in bringing about the economies which can alone be secured through the

The Report was careful to make clear that the elimination of the compulsory features was not an abandonment of the objective of regional interconnection and coordination of bulk power supply facilities, for it said that while such provisions "may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. . . ."[22] Indeed, Congress' increased reliance on voluntary action for achievement of the objective necessarily emphasizes its intention that the antitrust laws not apply, for their applicability would discourage or prevent the desired voluntary actions.

The House Committee manifested its adherence to the original objective of the provision by strengthening 202(a). It changed its wording so as to expressly lay upon the FPC the "duty to promote and encourage

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planned coordination which has long been advocated by the most able and progressive thinkers on this subject.

"When interconnection cannot be secured by voluntary action, subsection (b) gives the Commission limited authority to compel interstate utilities to connect their lines and sell or exchange energy. The power may only be invoked upon complaint by a State commission or a utility subject to the act. The Commission is given authority to prescribe the terms under which the interconnection and exchange are to be carried on, including the price to be paid for the service.

"Subsection (c) gives the Commission a much broader and more complete authority to compel the connection of facilities and the generation, delivery, or interchange of energy during times of war or other emergency. This is a temporary power designed to avoid a repetition of the conditions during the last war, when a serious power shortage arose. Drought and other natural energencies have created similar crises in certain sections of the country; such conditions should find a Federal agency ready to do all that can be done in order to prevent a breakdown in electric supply."

[22] *Id.*, p. 19.

such interconnection and coordination . . . by voluntary action of the private and public owners of such electric facilities." [23] It also broadened the compulsory power of the FPC under § 202(b). Where the Senate had limited that power to interconnections between interstate utilities, the House Committee "saw no reason for denying the same privilege to a company engaged in intrastate commerce." [24]

The House amendment of § 202(a) was adopted in the Conference Committee substitute, "with minor modifications." [25] The broadening of § 202(b) by the House was retained.[26]

Plain repugnancy means supersedure of antitrust laws pro tanto.—That which § 202(a) makes it the FPC's explicit "duty . . . to promote and encourage" cannot be unlawful under the antitrust laws. The repugnancy is plain [27] and the legislative history to which we have referred confirms Congress' intention that the anti-trust laws should not apply.

The lawfulness of the Companies' alleged activities was, therefore, not properly called in question by Cities' charges of violations of the antitrust laws. If facts could properly be alleged showing that there is a question whether

(1) the Companies' bulk power supply facilities (or the terms upon which sales or exchanges

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[23] See H. Report No. 1318, 74th Cong., 1st Sess., p. 74.

[24] H. Report No. 1318, 74th Cong., 1st Sess. (1935), p. 28.

[25] H. Report No. 1903, 74th Cong., 1st Sess. (1935, p. 74.

[26] *Id.*, pp. 48-49.

[27] Compare *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 350-351 (1963).

of energy are available to the Cities) satisfy the requirements and standards of § 202(a) and (b),

(2) the service rendered or offered is inadequate or insufficient under § 207,[28] or

(3) a rate, charge or classification (or facilities, rule, regulation, practice or contract affecting or relating thereto) is unjust, unreasonable, or unduly discriminatory or preferential within the meaning of § 205,[29]

such questions might appropriately be raised by an application to the FPC under § 202(b), or by complaint under § 206(a)[30] or 207[31] or by an application for a declaratory order under § 309 of the Power Act, the Administrative Procedure Act (5 U.S.C. § 554(e)), and § 1.7(c) of the FPC Regulations (18 C.F.R. § 1.7 (c)). But no question outside the scope of the FPC's regulation under these sections is presented by allegations of prevention of the establishment of a competing bulk power supply system. Until and unless such a question is presented, no question of applicability of the antitrust laws can be involved.

II. THE CASES RELIED ON ARE INAPPOSITE. WHILE APPOSITE CASES ARE IGNORED

In the light of the foregoing, the cases relied upon by the Cities in their petition, and by the court below, are plainly inapposite.

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[28] 49 Stat. 853 (1935); 16 U.S.C. 824f.

[29] 49 Stat. 851 (1935); 16 U.S.C. 824d; Pet., App. G, pp. 49a-50a.

[30] 49 Stat. 852 (1935); 16 U.S.C. 824e(a); Pet. App. G, pp. 51a-52a.

[31] 49 Stat. 853 (1935); 16 U.S.C. 824(f).

The court rested its decision mainly on *Denver & Rio Grande Western R.R.* v. *United States,* 387 U.S. 485 (1967),[32] saying that § 204 of the Power Act "is almost identical with the pertinent provisions of § 20a of the Commerce Act. . . ."[33] But, as we have seen, this overlooks the distinction FPC Solicitor DeVane pointed out when the Wheeler-Rayburn Bill was under consideration by Congress. He contrasted what is now § 202(a), which was intended, *inter alia,* as "a means of eliminating the evils that accompany rivalries and jealousies between systems in a field where competition has long been abandoned as a method of control", with the Interstate Commerce Act (*supra,* pp. 11-12).[34]

McLean Trucking Co. v. *United States,* 321 U.S. 67 (1944), cited by the court below is similarly inapposite.

The absence of any provision in the Natural Gas Act[35] and anything in its history comparable to that of § 202(a), (*supra,* p. 8), makes the decisions[36] under that Act that were relied on by the court below,[37]

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[32] 454 F.2d at 948-953; Pet., App. A, pp. 12a, n. 9, 14a-20a, 22a. This case is also cited by Cities, Mem. in Opp. p. 3.

[33] 454 F.2d at 949; Pet., App. A, p. 14a. The Court below quotes from § 202(a) in another connection (454 F.2d at p. 951; Pet., App. A, pp. 18a-19a) but nowhere recognizes the basic question of its effect on the applicability of the antitrust laws.

[34] 454 F.2d at 948, n. 9; Pet., App. A, p. 13a, n. 9.

[35] 52 Stat. 821-833 (1938), as amended; 15 U.S.C. 717-717w.

[36] *E.g., United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); *California* v. *FPC,* 369 U.S. 482 484-485 (1962); *Northern Natural Gas Co.* v. *FPC,* 130 U.S. App. D.C. 220, 226, 399 F.2d 953, (1968); *City of Pittsburgh* v. *FPC,* 99 U.S. App. D.C. 113, 237 F.2d 741 (1956).

[37] 454 F.2d at 948 n. 8 and 9, 953, n. 25 and 27; Pet., App. A, p. 13a, n. 9, p. 23a, n. 25 and 27.

and by the Cities in opposing the petition for certiorari,[38] wholly inapposite.[39]

Similar considerations apply to the decision under the Public Utility Holding Company Act of 1935, § 10, 15 U.S.C. 79, in *Municipal Electric Association of Massachusetts* v. *SEC,* 134 U.S.App.D.C. 145, 413 F.2d 1052 (1969),[40] for that Act, too, has no provision like § 202(a) of the Power Act. So, also, to the decision in *United States,* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), under the Bank Merger Act of 1960 (12 U.S.C. § 1828(c)).[41]

The Federal Maritime Commission cases cited by the court below[42] are also inapposite. The antitrust law immunity that the statute in each of those cases gives to agreements approved by that Commission is

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[38] Cities Mem., p. 3.

[39] Indeed, omission from § 314(a) of the Power Act (16 U.S.C. § 825m(a)) of any provision for referring evidence of apparent violations of antitrust laws to the Attorney General, like that in § 20(a) of the Natural Gas Act (15 U.S.C. § 717s(a))—which puzzled the court below (454 F.2d at 953, n. 27; Pet., App. A., p. 23a, n. 27)—may be a corroborative indication of the highly limited scope of the antitrust laws in regulation under the Power Act.

[40] Cited by Cities, Mem. in Opp., p. 3, and by the court below, 454 F.2d 948, n. 9; Pet. App. 13a n. 9.

[41] Cited by the court below, 454 F.2d at 948, n. 9; Pet., App. A, p. 13a, n. 9.

[42] *FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968); *Marine Space Enclosures* v. *FMC,* 137 U.S.App. D.C. 9, 17f, 420 F.2d 577, 585 (1969). Cited by the court below, 454 F.2d at 948, n. 9; Pet., App. A, p. 13a, n. 9. Cited by cities, Mem. in Opp., p. 3. *Pennsylvania W. and P. Co.* v. *Consolidated Gas, E.L. and P. Co. of Baltimore,* 184 F.2d 552 (1950), *certiorari denied,* 343 U.S. 963 (1952).

subject to an almost circular provision governing Commission disapproval of any agreement found to be "contrary to the public interest." This "public interest" concept is unlimited by any statutory provision like § 202(a), and the decisions upholding consideration of antitrust principles as part of such unlimited "public interest" concept are obviously inapplicable where § 202(a) is controlling.

This completes the "host of decisions" cited by the court below to support relevancy of the asserted anticompetitive purpose or consequence of the authorization Gulf States sought under § 204. Decisions under the Power Act are conspicuous by their absence from the court's list. But attention may be called to *Pennsylvania Water and Power Company* v. *FPC*, 343 U.S. 414, 421-423 (1952), and to the District of Columbia Circuit's decision that was there affirmed (89 U.S.App. D.C. 235, 237-243, 193 F.2d 230, 233-238). In that case, although an interconnected and coordinated generating and transmission arrangement had previously been held illegal by the Fourth Circuit under the antitrust laws (in a case to which the FPC was not a party),[43] the FPC was there sustained in nevertheless ordering that arrangement continued. This Court relied on § 202(a) (343 U.S. at 423), as had the District of Columbia Circuit (193 F.2d at 237). There have been no subsequent decisions under the Power Act to detract from the authority of those decisions.

It is to be noted that the antitrust law violations here alleged, like those involved in the *Penn Water* case run to interconnected and coordinated systems

[43] *Consolidated Gas, E.L. and P. Co. of Baltimore* v. *Pennsylvania W. and P. Co.*, 184 F.2d 552 (1950), *certiorari denied*, 343 U.S. 963 (1952).

operations, not to the managerial freedom of those involved. Compare 343 U.S. at pp. 421-422. Thus the questions do not arise here on which the Fourth Circuit (in *Consolidated Gas Elec. L. and P. Co. of Baltimore* v. *Pennsylvania W. and P. Co.*, 194 F.2d 89 (1952) *certiorari denied*, 343 U.S. 963 (1952)) differed with the District of Columbia Circuit decision in *Penn Water* (193 F.2d 230). See *supra*, p. 19.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

HOWARD E. WAHRENBROCK
Attorney for Public Service Company of Indiana, Inc.
Room 605
1725 K Street, N.W.
Washington, D.C. 20006

Of Counsel:

CHARLES W. CAMPBELL
General Counsel
Public Service Company
of Indiana, Inc.
100 East Main Street
Plainfield, Indiana 46168